In with the Old: Creeping Developments in the Law of Unlawful Command Influence

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Introduction

On the surface, 1996 might give the impression of providing no significant developments in the law of unlawful command influence. Neither the Court of Appeals for the Armed Forces (CAAF) nor the service courts issued a command influence opinion likely to be of great precedential value. The year did, however, feature several opinions that start to make clear which opinions from prior years will be of enduring significance in clarifying the burden of proof in command influence cases, and in giving clearer guidance to counsel on how to litigate these issues. The message in short is as follows: rely on *Ayala*[1] and *Stombaugh*,[2] ignore *Gleason*,[3] argue aggressively if you represent the government, and raise the issue promptly and vigorously as defense counsel.

Burden Shifting

The contentious issue of how the defense shifted the burden to the government to force it to disprove the existence of command influence generated the *Ayala* opinion in 1995. In that decision, the CAAF found that an affidavit asserting command influence, compiled after trial and in presumed good faith by a specialist who was a friend of the accused, was insufficiently specific to require the government to answer.[4] In this term the courts relied on *Ayala* several times, most notably to find that the burden did not shift in a case where a senior commander of the accused clearly made intemperate statements.

'Now go give the low lifes a fair trial'

In *United States v. Newbold*,[5] the commander of the accused's ship held an "all hands" formation the day after the accused and four others were arrested for rape. In the formation, Lieutenant Commander (LCDR) Casto, the commander, talked about the incident and called the alleged participants "low lifes and scumbags," who should be punished.[6] He held a second such meeting two weeks later, at which he read a letter from a co-accused apologizing for the conduct.[7] At this formation the commander said he "could not understand how some of the crew could 'welcome these rapist[s] back into our arms.'"[8] An affidavit, generated by a female seaman apprentice also said that the commander told women sailors, at a separate meeting, that a number of male sailors had little regard for females; the commander, according to the affidavit, referred to such men as "animals."[9]

The CAAF dismissed the accused's allegation of unlawful command influence on three primary grounds: (1) the ship commander was not a convening authority in the accused's case, (2) Newbold pled guilty, and (3) he did not complain in any of his motions or post-trial submissions about possible unlawful command influence.

A number of facts worked together in *Newbold* to limit the potentially damaging nature of the commander's statements. The fact that none of the panel members was from the accused's ship removed one possible effect of command influence,[10] assuming the members who served on Newbold's panel were

1. 43 M.J. 296 (1995).

2. 40 M.J. 208 (C.M.A. 1994) (suggesting that command influence can only be exerted by one acting with the "mantle of command authority").

3. 43 M.J. 69 (1995) (overturning the conviction of a sergeant major for, *inter alia*, solicitation to murder, because a lieutenant colonel made remarks that the three-person majority found to have intimidated witnesses).

4. *Ayala*, 43 M.J. at 300 (the accused's friend, Specialist Slack, cited seven NCOs and officers whom he contacted and who, he asserted, did not support the accused for a variety of command-induced reasons).

5. 45 M.J. 109 (1996).

6. *Id.* at 110.

7. *Id.*

8. *Id.*

9. *Id.* at 110-11.

10. "No members of the court-martial were from appellant's ship." *Id*. at 113.

ignorant of (or, because of the absence of a command relationship, impervious to) the commander's statements. The CAAF strongly relied, however, on Newbold's waiver of the Article 32 investigation, his plea of guilty, and his evident disinclination to raise the issue at trial or at the clemency stage.[11] Unlike some command influence cases, the majority opinion did not offer even cursory criticism of the ship's commander.[12]

Still, the decision is important because it reinforces the significance of *Ayala*, signaling if not a "hard line" on command influence claims, at least a continued willingness to require a significant and specific showing of prejudice *to the case at hand* before shifting the burden to the government, much less granting relief. The CAAF reinforced the three-part test laid out in *Stombaugh* for litigating command influence issues.[13] In choosing not to even address the ship commander's comments, which would be highly significant if issued by a convening authority,[14] the CAAF raised the question about the vitality of the area of "apparent command influence," in which the court looks not just at the effect on a particular case but the effect on the perceptions of fellow servicemembers and the general public.[15] It is arguable that the comments made on a ship have little effect on the general public, but the effect on fellow sailors was potentially significant. With no analysis, the court simply quoted with approval the service court opinion that Newbold "failed . . . to establish . . . apparent command influence."[16] It relied quite heavily on the fact that the statements were not issued by a convening authority, though clearly by a person in command authority,[17] and that the accused pled guilty. The court simply pronounced itself satisfied that there was no "apparent" command influence.[18]

Newbold contains important lessons for all practitioners. It counsels the government not to be intimidated simply because a commander makes remarks that, if made by a convening authority, might disqualify the convening authority and require other corrective action, such as re-initiation of the charging process, panel re-selection, or liberal granting of challenges for cause. For defense counsel, it reinforces two points that have become increasingly obvious in recent years: (1) command influence not only is waiveable, but a conscious decision not to raise it when aware of it will be considered to be waiver in most circumstances, and (2) counsel need to be persistent, creative, timely and specific in linking actions or comments by commanders or convening authorities to a specific harm in the case at hand, such as intimidated witnesses or junior commanders, or compromised panel members.

Squaring *Newbold* with *Gleason*

It is most instructive to contrast *Newbold* with *United States v. Gleason*,[19] one of the 1995 command influence cases, and an instance in which the court took the extraordinary step of disapproving findings and sentence because of the prejudicial state-

11. *Id.* at 111.

12. In a terse concurrence, Judge Sullivan wrote, "The comments made by the ship's captain were improper. However, the defense did not present any evidence that this conduct impacted on appellant's trial." *Id*. at 113 (Sullivan, J. concurring) (citations omitted). This contrasts, at least in tenor, from two bitter dissents that Judge (then Chief Judge) Sullivan wrote in the 1995 term.

13. *Newbold*, 45 M.J. at 111. In *Stombaugh*, the unanimous court said the defense "must (1) 'allege sufficient facts which, if true, constitute unlawful command influence'; (2) show that the proceedings were unfair, and (3) show that the unlawful command influence was the proximate cause of that unfairness." *Stombaugh*, 40 M.J. at 211.

14. *See, e.g.*, United States v. Cortes, 29 M.J. 946 (A.C.M.R. 1990) (post commander and convening authority wrote post newspaper article characterizing drug dealers as "slime," "filth," and "unspeakably sordid . . . criminals [who] have no place in a free society"); United States v. Griffin, 41 M.J. 607 (Army Ct. Crim. App. 1994) ("There is no place in our Army for illegal drugs or those who use them." This statement suggesting an inflexible disposition by the convening authority was in a policy letter on health and fitness).

15. United States v. Cruz, 20 M.J. 873, 880-84, *rev'd in part on other grounds*, 25 M.J. 326 (C.M.A. 1987).

16. *Newbold*, 45 M.J. at 111 (quoting the Navy-Marine Court's unpublished opinion at 4).

17. The opinion notes that "the commander was [not] the special court-martial convening authority." *Id*. The CAAF also mentions that "there is nothing in the record to indicate that the commander made any recommendation as to the disposition of the charges," suggesting that Lieutenant Commander (LCDR) Casto may have been a summary court-martial convening authority. *Id*. The court cites *United States v. Nix*, 40 M.J. 6 (C.M.A. 1995) to reinforce the significance of LCDR Casto's not acting as special court-martial authority in this case. The court found significant the fact that LCDR Casto did not convene the court in question--which, in *Nix* (a case having to do with disqualifying of an accuser-convening authority), happened to have been a special court-martial. The opinion does not make clear whether LCDR Casto was a summary court-martial convening authority--and, more importantly, whether his having *some* level of convening authority was at all significant in the court's analysis. It seems unlikely that Casto had any convening authority, as the court observed that "there is nothing in the record to indicate that the commander made any recommendation as to the disposition of the charges." *Newbold*, 45 M.J. at 111. Even this, however, is ambiguous, as the absence of anything in the record could mean that he chose not to make a recommendation in this case or that he had no authority to make such a recommendation. *See generally* R.C.M. 401(c)(2)(A). "When charges are forwarded to a superior commander for disposition, the forwarding commander shall make a personal recommendation as to disposition. If the forwarding commander is disqualified from acting as convening authority in the case, the basis for the disqualification shall be noted." *Newbold*, 45 M.J. at 111.

18. *Newbold*, 45 M.J. at 111. For a treatment of the concept of apparent command influence, see *Cruz*, 25 M.J. at 889-92.

19. 43 M.J. 69 (1995).

ments of a lieutenant colonel battalion commander. The officer who made the intemperate comments in *Gleason*, an Army lieutenant colonel and battalion commander stood in no appreciably greater position of authority to the accused than the navy lieutenant commander in *Newbold*.[20] The statements of the commander in *Gleason*, Lieutenant Colonel (LTC) Suchke, were not obviously more objectionable than those of LCDR Casto.[21] In addition, LTC Suchke issued several public retractions, while LCDR Casto issued none.[22] Two key distinctions, however, should inform the analysis and likely actions of counsel and courts in future such cases: Newbold pled guilty, and was able to find someone from his unit to testify on his behalf.[23] In the *Weasler*[24] opinion in 1995, the majority opinion affirmed that a soldier can make an informed, uncoerced choice to waive an unlawful command influence issue.[25] In that vein, Newbold's choice to forego litigating the possible command influence issues is unremarkable and legally defensible, if not endorsed by the CAAF. *Gleason* turned, more than anything, on the issue of witness availability or intimidation. The CAAF marveled that no one from the accused's unit (though he had other witnesses) testified for this "almost God-like" sergeant major.[26] Regardless of the clumsy link that the CAAF endorsed--assuming an absence of witnesses derived from the intemperate comments of a mid-level commander[27]--the *Newbold* prosecutors seem to have been vaccinated against it by the defense's calling "a senior petty officer from appellant's ship with 27 years service."[28] To be clear, there are significant factual distinctions between *Newbold* and *Gleason*. Though both involved statements by a field grade officer, *Gleason* also involved other actions that the court found created "a command climate . . . that bordered on paranoia."[29] Still, the courts allowed an impression of a negative "command climate" to justify the extraordinary step of disapproving findings and sentence in an extremely serious case. Regardless, Gleason has minimal precedential value and, because the courts focused on atmospherics, provides no reliable guidance to practitioners on what actions or combinations of actions constitute command influence.[30] Beyond the prosaic understanding that a finding of command influence will depend on the unique facts of the case, *Gleason* does not drive that analysis further by clearly explaining what type of conduct rises to the level of paranoia that constitutes unlawful command conduct.[31]

In *United States v. Drayton*,[32] the CAAF found that statements made by a command sergeant major (CSM), prompted by the arrest of the accused, an Army staff sergeant (E-6) for

20. LTC Suchke, was an Army O-5 (fifth officer pay grade) and Gleason's summary court-martial convening authority, while LCDR Casto, was a Navy O-4 with no court-martial convening authority. *See supra note* 16 and accompanying text. This is not to say that possessing authority to convene courts is not a matter of some weight. However, under the circumstances of *Gleason*, it is not the possession of convening authority that made a difference. There was no reasonable prospect that solicitation to commit murder would result in anything other than a general court-martial. Therefore, it is not LTC Suchke's possession of convening authority but his position of commander of those who heard his statements that is most relevant--and which places him in an equivalent position to the ship commander in *Newbold*.

21. LTC Suchke said he believed the accused was guilty, characterized the defense counsel as the "enemy" and trial counsel as "friend," and discouraged witnesses from testifying for Gleason. *Gleason*, 43 M.J. at 72-75. LCDR Casto, among other things, called the accused and his fellow sailors "rapists" and animals who targeted women for sexual intercourse, keeping score of their conquests. *Newbold*, 45 M.J. at 110-11.

22. The Army Court of Criminal Appeals found LTC Suchke's retractions and clarifications, issued on at least three occasions, including the day after the comments were first made, to be ineffectual, and the CAAF ignored them. *United States v. Gleason*, 39 M.J. 776, 780-81 (A.C.M.R. 1994).

23. Again, key to the *Gleason* decision was that he pled not guilty and the court linked the absence of witnesses to the statements of the commander. *Gleason*, 43 M.J. at 74-75.

24. United States v. Weasler, 43 M.J. 15 (1995).

25. Both (then) Chief Judge Sullivan and the late Judge Wiss issued stinging dissents in *Weasler.* Chief Judge Sullivan wrote that the majority had sanctioned "private deals between an accused and a command to cover up instances of unlawful command influence . . .[,] a 'blackmail type' option to those who would engaged in unlawful command influence." *Id*. at 20-21 (Sullivan, C.J., dissenting). Judge Wiss wrote that the majority opinion would enable a convening authority to "buy off that accused's silence and go on his merry way." *Id*. at 21 (Wiss, J., dissenting).

26. *Gleason*, 43 M.J. at 75.

27. The majority opinion states, "we do not believe that--absent command influence--these same [sentencing] witnesses would have been any less willing to testify as character witnesses on the merits . . . ." *Id*. Judge Gierke's dissent, joined by Judge Cox, asserted the dubious causal link between LTC Suchke's statements and the lack of witnesses from the accused's unit, noting that "a good-soldier defense would have been dead on arrival" and that the majority irrationally inflated the significance of the comments of one lieutenant colonel "that virtually the entire United States Army was intimidated by him from rallying" to the defense of the 26-year veteran, who had served in many units and assignments during a distinguished career. *Id*. at 77 (Gierke, J., dissenting). The case was the subject of considerable press attention, and was featured on CBS' "60 Minutes" television program.

28. *Newbold*, 45 M.J. at 111.

29. *Gleason*, 43 M.J. at 72-73 (quoting the Army Court of Military Review). The CAAF continued: "We find that the command climate, atmosphere, attitude, and actions had such a chilling effect on members of the command that there was a feeling that if you testified for the appellant your career was in jeopardy." *Id*. at 73 (quoting the Army Court of Military Review).

30. The *Gleason* majority (it was a 3-2 decision) included Senior Judge Everett, who is likely to sit much less in the future, now that the CAAF again has five permanent members with the addition of Judge Effron, and the late Judge Wiss. Judge Crawford did not participate in the case.

shoplifting, again failed the *Ayala* test for shifting the burden to the government. In *Drayton*, the CSM addressed a Noncommissioned Officer Development Program (NCODP) meeting two weeks after the accused's arrest for shoplifting. At the meeting where generic tapes of the Post Exchange's video monitoring system were displayed, the CSM talked broadly about shoplifting as well as about, according to Drayton, "the NCO in the Battalion," opining that "it didn't look good for him."[33] The majority, relying on *Ayala*, said the defense failed to meet the burden of showing who might have been intimidated from testifying. While lightly chiding the CSM for the comments,[34] the court found he "merely recited a truism, that 'it didn't look good for'" Drayton.[35] More complicated for future cases is the majority's implicit sanction of the language because of the intent of the speaker. Judge Gierke wrote that the defense failed to prove that the CSM "intended to influence his subordinates" and that his comments were aimed at "deterring them from shoplifting, not deterring them from testifying for appellant."[36] The CAAF relied heavily on the fact that Drayton called five noncommissioned officers, including two senior to him from his company, to refute any suggestion that witnesses were intimidated. "We are left to speculate who, if anyone, from appellant's battalion was intimidated into silence by the" CSM.[37] To the extent that this follows traditional analysis--absence of proof of intimidated witnesses--it bolsters a clearly-developing line of healthy precedent. Judge Gierke's suggestion, however, that the CSM's *intent* was relevant--*i.e.*, that he only intended to deter shoplifting, not testimony--would entail a significant broadening of the government's defenses in analyzing command influence statements. Most commonly, such statements are interpreted in light of the reasonable *receiver* of the communication, so that the speaker's intentions are irrelevant. The CAAF may find itself having to clarify or restrict Judge Gierke's interpretation of the CSM's statement in this case, to make clear that his intent was irrelevant but that the effect of his good faith--an absence of effect on witnesses--was the relevant measure of the absence of command influence.

Assessing Your Prospects

If the CAAF cannot find some tangible prejudice, it seems inclined to find "command influence in the air"[38] but not to require corrective action. Still, practitioners can draw some direction from recent cases which steer practitioners to focus more of their analytical attention on cases such as *Ayala* and *Stombaugh* and to treat the rarely cited *Gleason* as a dramatic, fact-bound opinion designed to show that the courts will, out of sheer pique, reverse findings and sentence when sufficiently outraged by a commander's conduct, notwithstanding attempted or actual corrective measures.[39]

Defense counsel need to assess their cases with cold realism. Presumably, Newbold and his counsel concluded that the intemperate statements alone probably were not going to win the accused long term relief. The statements could have affected panel selection and witness availability, but even if the panel had included members from the accused's ship (or others "infected" by the comments), that issue could have been resolved at that stage of the trial.[40] Witness availability seems frequently to be the linchpin of these issues, and the fact that the defense was able to call a compelling witness may have been an additional factor that motivated Newbold to limit the signifi-

31. The opinion of the Army Court gives a better catalogue of some of the actions--other than the comments of LTC Suchke--that the court found damaging and offensive. They include returning the accused to Okinawa in leg irons and chains under a Marine guard, limiting visitors to immediate family and lawyers unless LTC Suchke approved, and search and interrogation of members of the accused's company for evidence of gun and drug smuggling (related to some of the accused's alleged offenses). *Gleason*, 39 M.J. at 780.

32. 45 M.J. 180 (1996). The issue of waiver of defects in the preferral process is probably the more significant portion of the *Drayton* decision and it is addressed later in this article. *See infra* text accompanying notes 88-93.

33. *Id.* at 182 (quoting accused's affidavit).

34. The court said, "It is risky for a person in authority to comment on the merits of a pending case, especially in front of subordinates." *Id.*

35. *Id.*

36. *Id.* at 182-83.

37. *Id.*

38. Frequently cited quotation the CAAF uses as a preface to holding that the conduct in question was not ideal, but is insufficiently proven or insufficiently serious to warrant relief. United States v. Allen, 33 M.J. 209, 212 (C.M.A. 1991), *cert. denied*, 503 U.S. 936 (1992) (citations omitted) ("Proof of [command influence] in the air, so to speak, will not do.").

39. Key to the *Gleason* decision was the link the three-judge majority drew between the battalion commander's comments and the fact that no one from Gleason's unit testified in his behalf. This is a possibly logical but crude tautology that was criticized by Judge Gierke in his dissent. *See Gleason*, 43 M.J. at 77-78 (Gierke, J., dissenting) ("The majority opinion rests on . . . [the assumption that] Lieutenant Colonel (LTC) Suchke's influence was so great that virtually the entire United States Army was intimidated by him from rallying to SGM Gleason's defense . . . . The majority opinion does not explain how one battalion commander's actions could deprive SGM Gleason of 'good soldier' testimony from officers senior to LTC Suchke or witnesses from other battalions and earlier assignments.").

40. A court could have treated the charges as unsworn if the preferral process was seen as tainted, or have required new panel selection if the members' objectivity were seen to be compromised.

cant risk of contesting a rape charge at trial, in exchange for the certainty provided by a pretrial agreement.[41]

Perhaps in this vein, the CAAF has continued to place command influence in context. The term itself is insufficiently descriptive[42] because it does not fully embrace actors such as LCDR Casto who, though commanders, are not convening authorities. Their comments clearly have the potential to affect witnesses and members, but other individuals convene the courts and have some potential to "cleanse" the process, if not affected individuals, from the impact of improper statements. The CAAF owes practitioners some clarity on this issue: will the statements of non-convening authority commanders be evaluated differently, perhaps more indulgently, than those by commanders who also happen to be convening authorities? *Newbold* seems to suggest that this is true, but there are enough other variables in the case (most notably, defense pleas of guilty and witness production issues) that, in the absence of clear statements by the court, practitioners may draw misleading conclusions.

By applying the one-two *Ayala-Stombaugh* punch, the courts can avoid issues of waiver and avoid assessing the relative harm of arguable command influence. By consistently applying a method of analysis that heavily scrutinizes--and effectively screens out--command influence claims at the outset, the courts ensure that only the most consequential claims of command influence are addressed on the merits at the appellate level. A critic (*e.g.*, Judge Sullivan) may find this to be a continued "papering over" of command influence claims. Others, however, will see it as a now-predictable method that reliably sifts command influence claims based on whether there is a clear initial production of sufficient evidence requiring the government to marshal the resources to respond.

Issue Preservation

Newbold focuses on an issue of increasing importance when litigating command influence: at what point is it wiser for the defense to preserve an issue at the considerable risk of potentially harsh consequences for the client after the issue is resolved? This issue also arises in *United States v. Fisher*[43] where the convening authority, a Navy captain, evidently questioned the ethics of "any lawyer that would try to get the results of the urinalysis suppressed."[44] The challenge occurred during a recess after the captain had testified on a defense pretrial motion. He made the statements when the defense counsel interviewed him during a recess immediately following his direct examination.[45] Immediately after the recess, the defense cross-examined the captain but made no mention of the challenge. After losing the motion, the defense entered an unconditional plea of guilty; the claim regarding the disputed ethics was raised for the first time before the Navy-Marine Court of Criminal Appeals. The CAAF rejected "the naked request that we 'set aside the finding and sentence'" and dismissed the defense proposal that the court evaluate the case as though the convening authority had approved a conditional guilty plea, preserving the suppression motion.[46] The court operated on the assumption that the decision to plead guilty was an informed and intelligent decision, abetted by competent counsel. Whenever a potentially significant issue, such as command influence, is waived, the specter of ineffective assistance of counsel obviously looms. The court is sensitive to this whipsaw, however. It assumed that a competent counsel would not have waived such an issue and found no ineffective assistance in this case.[47]

Ultimately, the court found that the captain's comments did not affect the trial process, but that the comments reflected "a regrettable insensitivity to the adversarial process and the roles of the various participants in that process in ensuring a reliable and fair result."[48] Because the captain was a convening authority and because the court was "not confident that Captain Major

41. Newbold was sentenced to, *inter alia*, fifteen years' confinement, which was reduced to ten years by the convening authority, pursuant to a pretrial agreement. *Newbold*, 45 M.J. at 110.

42. Several commentators have noted the limitations of the term "command influence." *See, e.g.*, Deana M.C. Willis, *The Road to Hell is Paved With Good Intentions: Finding and Fixing Unlawful Command Influence*, ARMY LAW., Aug. 1992 at 3 (among other observations in this excellent and comprehensive article, the author makes the point that the term "'command influence' is a misnomer" and that accurately assessing and preventing it requires broadening the understanding of the actors--staff officers and other non-convening authorities--who can "commit" command influence, often without the knowledge, much less the indulgence, of a commander or the person who convened the court). *Cf.* United States v. Stombaugh, 40 M.J. 208 (C.M.A. 1994) (finding that individuals--in this case lieutenants--cannot be said to have asserted unlawful command influence unless they acted with the "mantle of authority").

43. 45 M.J. 159 (1996).

44. *Id.* at 160.

45. According to the defense counsel, the captain said "any lawyer that would try to get the results of the urinalysis suppressed was unethical. As I was the only lawyer in the room at the time, I concluded that he was clearly referring to me." *Id.*

46. The defense suggested that it did not pursue a conditional guilty plea because it "concluded that the convening authority would not consent to a conditional guilty plea . . . [because] BM1 Fisher had been acquitted months earlier at a previous court-martial for an earlier positive urinalysis." *Id.* (quoting defense counsel's affidavit to the Navy-Marine Court).

47. The court noted that nothing has come to light to suggest that the decision to plead guilty (and thereby waive the command influence issue) "resulted from legal advice that reflected either an understanding of the law or a tactical judgment that is so unreasonable as to constitute ineffective representation." *Id.* at 162 (citation omitted).

had the necessary objectivity to perform his post-trial responsibilities and exercise his unique discretion,"[49] it ordered that the case be returned to a new convening authority for a new action. In reaching its conclusion that Captain Major had forfeited his ability to take post-trial action, the CAAF gave significant weight to the fact that he chose not to accept the military judge's recommendation that he suspend the bad-conduct discharge. "While it was his lawful prerogative to decline to follow that recommendation, the very fact that he was required to exercise discretion on such an important question emphasizes the need for a convening authority who will be appropriately open-minded to the competing interests."[50]

This decision is instructive in several respects. It means that, to some degree, the military judge can put the convening authority in a box when there have been allegations of command influence pertaining to the convening authority personally. It also means that a Staff Judge Advocate can potentially defuse a command influence issue by recommending to the same convening authority that he grant such relief, especially when given the opportunity by the military judge to appear "open-minded."[51] This possibility of a sort of self-executing "defusing" of a command influence issue, however, raises anew, albeit in a slightly different context, the concerns of the two critical concurring judges in *Weasler* who questioned whether a convening authority should ever be able to approve a waiver of command influence in a case in which he has an acknowledged self-interest.[52] *Weasler* itself, however, did not involve allegations of command influence directed at the convening authority who approved the pretrial agreement.[53]

Another lesson from this case is that defense counsel must make tough choices between timely disclosure that might yield mild short-term relief and issue preservation that might yield more significant long-term relief (such as disapproval of findings and sentence) to their clients. Here the court pointedly noted that the defense counsel "did not disclose to the military judge Captain Major's recess comment or make any reference to it during his cross-examination of Captain Major,"[54] which it commended as "aggressive and effective."[55] "Inexplicably, as earlier implied, defense counsel said nothing about this matter even prior to Captain Major's taking his final action on the case as convening authority."[56] This makes it particularly tough for the court to prescribe the relatively radical remedial measures (disapproving findings and sentence, treating the case as though it were a conditional guilty plea) the defense proposed on appeal. It may also mean that the language did not automatically trigger a response by the defense because, in context, it was the inarticulate rant of a non-lawyer, expressing his frustration with a system that seems to suppress probative evidence--as opposed to his literally questioning the defense counsel's ethics as an Army officer or licensed attorney. Standing alone in dissent,[57] Judge Crawford suggested that nothing more than a *DuBay* hearing was required, because the defense had not shown that "the remarks showed the lack of objectivity and were not just an unfortunate choice of words, and second, that they had an impact on the proceedings."[58] The dilemma for the

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48. *Id.*

49. *Id.* at 162.

50. *Id*.

51. The court acknowledged here that it was the convening authority's "lawful prerogative to decline to follow that recommendation, [but] the very fact that he was required to exercise discretion on such an important question emphasizes the need for a convening authority who will be appropriately open-minded to the competing interests." *Id*.

52. Chief Judge Sullivan wrote that such deals provide "a 'blackmail type' option" to implicated convening authorities, meaning that "[a]ny accused who finds out about command influence can blackmail the guilty commander into giving him a lenient deal," creating a system of "bartered justice." United States v. Weasler, 43 M.J. 15, 21 (1995) (Sullivan, C.J., concurring). Judge Wiss was no less severe, writing that the majority's rationale in the case means that when an issue of command influence arises, "all that the commander has to do is buy off that accused's silence and go on his merry way . . . ." *Id*. (Wiss, J., concurring). In neither *Fisher* nor *Brown* does the court use the term "waiver" as such, but both courts seem to be finding constructive waiver when the defense chooses not to waive and litigate a command influence issue on which it is on notice at the time of trial. The *Fisher* majority addresses waiver in the context of the defense's choice or failure to pursue Captain Major's disqualification to act post-trial, choosing to "decline to invoke waiver," because it was not clear that the accused was made aware of the statement, and to invoke waiver "probably would serve only to raise a substantial question as to the effectiveness of counsel's representation at that stage." United States v. Newbold, 45 M.J. 109, 163 (1996).

53. The case arose from a company commander's order to her acting commander to prefer charges against the accused while the commander was away on leave. *Weasler*, 43 M.J. at 16.

54. *Newbold*, 45 M.J. at 160. The majority reiterated this point later in the opinion, writing about its "puzzlement as to why trial defense counsel did not make Captain Major's statement a matter of record at trial or contest" his post-trial qualifications. *Id*. at 163.

55. *Id.* at 160.

56. *Id.*

57. Judge Sullivan appears to have written a concurring opinion just to marvel at the path the case took and that the decision, which reverses a unanimous decision of the Navy Court, nearly did not make it to the CAAF. "A very close thing is Justice!" *Id*. at 163 (Sullivan, J., concurring).

defense counsel is one for which trial counsel will have little sympathy: how to best preserve an issue without giving the government such clear and obvious notice that the defense ends up with the worst of both worlds (i.e., having raised an issue and having the government correct it so that it does not survive on appeal). The defense must make other difficult strategic decisions without the specter of command influence to use as leverage for a better deal or other disposition.

As in *Fisher*, the issue in *United States v. Brown*,[59] an unpublished opinion of the Army Court of Criminal Appeals, concerned statements by a convening authority that the defense chose not to attack until after trial. Unlike *Fisher*, the statements in *Brown* were not specific to the accused's case, but stemmed from articles appearing under the convening authority's by-line in the post newspaper in which he wrote, "there is no place in our Army or our community for child abusers." The accused was convicted of two specifications of indecent acts[60] and sentenced to a bad-conduct discharge and reduction to E-1. Again, the court returned to the fact that the defense had ample notice of the questionable conduct and chose to take no action at the trial stage. "Considering both articles as a whole, the time period when they were written, and *the fact that appellant's trial defense team chose not to voir dire the members concerning their knowledge of the articles*," the Army Court found no evidence that members knew of the articles or that they affected their impartiality on findings or sentence.[61]

The majority cites *United States v. Martinez*[62] in support of its ruling. *Martinez*, however, involved a more benign set of circumstances. In *Martinez*, the convening authority sent a letter to all servicemembers on an installation, emphasizing the dangers of drinking and driving and then impermissibly suggesting possible punishments. The CAAF found harmless error because of the good faith of the author, prompt, credible clarification, and the absence of effect on a subsequent court-martial.[63] *Brown*, by contrast, involved a more personally crafted, widely dispersed letter to a broader audience on a topic more likely to be inflammatory, and there was no retraction or attempt to limit the effect of the letter. The court would have done better to squarely find waiver, based on the absence of defense activity in the case than to cite *Martinez* in which the problem was more narrow in scope and more easily addressed, and in which waiver was not an issue.[64]

Gerlich and the Fig Leaf of "Systemic" Concerns: "Is the Boss Trying to Tell Me Something?"

In *United States v. Gerlich*,[65] the last command influence case of 1996, the CAAF again relied on *Ayala*,[66] in holding that the burden of proof for disproving command influence does not shift until the defense meets its burden of production.[67]

The controversy arose when the government tried Gerlich for assault after he received an Article 15 for drunk and disorderly conduct arising out of the same incident, from his commander, Major Shogren.[68] After the Article 15, the victim met with Colonel Mayfield, the special court-martial convening authority (SPCMCA), who took no action at the time, and then with the Inspector General (IG). In response to the official inquiry, Colonel Mayfield wrote back to the IG, "I feel Gerlich was appropriately punished [by the Article 15] for his wrongdoing."[69] The IG then sent a letter to the general court-martial convening authority (GCMCA), Major General Link, in which he wrote, "I believe military justice should punish perpetrators appropriately and serve to deter others . . . . I don't think that's been achieved in this case."[70] The general then wrote to Colonel Mayfield in almost identical language,[71] adding, "request

58. *Id.* (Crawford, J., dissenting).

59. No. 9501370 (Army Ct. Crim. App. Nov. 14, 1996).

60. It is not clear from the opinion whether the charge was indecent acts *with a child*. If it were, the defense case regarding the effect of the articles would be stronger.

61. *Brown*, slip op. at 2.

62. 42 M.J. 327 (1995).

63. *Id.* at 331-33.

64. The opinion is relatively terse, however, and the court provides no context for the articles and does not address the timing of their publication, readership, or related issues that might be relevant, especially when comparing the case to *Martinez*.

65. 45 M.J. 309 (1996).

66. United States v. Ayala, 43 M.J. 296 (1995).

67. *Gerlich*, 45 M.J. at 310.

68. He received an Article 15 for drunk and disorderly conduct. When drunk on the night in question, Gerlich entered the victim's room and committed an indecent assault. *Id.* at 311.

69. *Id*. Colonel Mayfield made clear in his memo that he considered the assault on the "innocent victim who did not deserve what happened to her" at the time of the Article 15, but concluded that "Gerlich was appropriately punished for his wrongdoing." *Id*.

you consider a further investigation of the incident itself and the larger base 'climate' factors which may have been involved. This investigation could focus on answering [several] questions."[72] He concluded: "*Given that you agree further investigation is appropriate*, I would welcome hearing how you decide to address" the incident and "the overall living and working environment" here.[73]

Colonel Mayfield then sought an additional investigation, directed Major Shogren to set aside the Article 15, and ultimately referred the case to the special court-martial which found Gerlich guilty, reduced him to E-1 and adjudged a bad conduct discharge. Colonel Mayfield testified at a motion hearing that he felt no coercion from Major General Link, and that while he read the letter "with earnest," he wondered "Is the boss trying to tell me something? . . . . What is the boss trying to say? Is he trying to say anything on this? . . . . It was an innocent question and certainly not a coercive, pressure question, I didn't think."[74]

The CAAF reversed the Air Force Court of Criminal Appeals, finding command influence based on the peculiar rerouting of the case after the victim's complaint. The government failed to overcome the burden of proving the absence of command influence after the defense clearly shifted the burden. The court wrote that "[t]he Government may overcome its burden by either proving that command influence does not exist or, assuming that it does, that the accused was not prejudiced. However, *Ayala* did not specifically discuss the burden of proof as it relates to the two factors involved in overcoming the aforementioned presumption."[75]

The CAAF moved to squarely address an issue that has puzzled practitioners for several years: whether the burden of proof in command influence cases differs at the trial level (generally described as clear and convincing evidence or clear and positive evidence) from the appellate level (beyond a reasonable doubt, per *United States v. Thomas*[76]). The court said that *Thomas* "was predicated on the existence of unlawful command influence and addressed the issue of potential harm to an accused. This standard in *Thomas* was, in turn, predicated on the legal analysis involved in the finding of a constitutional violation in *Chapman v. California* . . . ." [77] The court continued: "Subsequent cases of this Court have not specifically delineated any distinction between the presumption of the existence of command influence and the presumption of prejudice or harm to an accused."[78] On the brink of clarity, however, the court retreated, saying, "we need not resolve the issue here" because "even assuming the lower standard of clear and convincing evidence is applicable, we hold that the Government did not meet its burden of proof."[79] The court reversed the findings and sentence, setting aside the opinion of the Air Force Court that had upheld the conviction.

Chief Judge Cox's opinion for the four-person CAAF majority found the sequence of events too jarring to dismiss. He wrote as follows:

> [I]t is clear from Colonel Mayfield's own testimony that he concluded that an Article 15 proceeding was appropriate and adhered to this view after discussing the incident with the victim and subsequently so advised the IG . . . . Only after receiving a letter from his superior did he conclude that some reexamination of his position was appropriate. Although he asserted that he was exercising his independent judgment when he concluded that a special court martial was a more appropriate forum, we have previously recognized *the difficulty of a subordinate ascertaining for himself/herself the actual influence a superior has on that subordinate.*[80]

70. *Id.*

71. The general's letter to Colonel Mayfield said, in part, "I believe our military justice system should punish perpetrators appropriately *and* serve to deter others from committing similar acts.'" *Id.* at 312 (emphasis in original).

72. *Id.*

73. *Id.* (emphasis added).

74. *Id.* at 313.

75. *Id.* at 310.

76. 22 M.J. 388, 394 (C.M.A. 1986).

77. *Gerlich*, 45 M.J. at 310-11.

78. *Id.* (citations omitted).

79. *Id.*

80. *Id.* at 313 (citations omitted) (emphasis added).

It is noteworthy that the court was unpersuaded by the couching of the reexamination of the case and preferral of court-martial charges in the language of a "systemic" examination of the climate at the Air Force base. Three times in the general's letter to the SPCMCA he makes some reference to examining "climate" issues, ostensibly larger than the case itself.[81] The CAAF did not directly address what appears to be the wrapping of a direction to rethink a case in the cloak of "systemic" concerns, but neither did it permit such language to derail its clear perception of the message the general was sending to his subordinates.

No Mentoring?

In her one paragraph dissent, Judge Crawford writes, "The majority's message to superior commanders appears to be that they may not exercise responsible command leadership by suggesting reconsideration of a particular disposition of a case. Instead, the only option is to forward the case to the superior commander for action."[82] While Judge Crawford cites *United States v. Wallace*[83] in support of her criticism, the majority accurately distinguishes *Wallace* on the grounds that Colonel Mayfield, unlike the subordinate in Wallace, "was aware of the full scope of appellant's activities prior to receiving a letter from his superior officer." The answer is not as neat as Judge Crawford seeks to pigeon-hole the majority opinion; *i.e.*, that a senior may never ask a junior to reconsider though it is not far from that. The majority opinion, unfortunately, is devoid of the sort of clarity or guidance that Judge Crawford seeks to impart by exception. The majority is clearly (and to this author, understandably) concerned about a transparent change of heart that worked to the considerable detriment of an accused. The majority could have further buttressed the quality and strength of its opinion by making clear the lawful options that were available to the command, such as withdrawing or withholding disposition authority.[84]

Whither Waiver?

For several years, the CAAF has wrestled with the issue of under what circumstances can an allegation of unlawful command influence be waived by the accused. In *United States v. Weasler*,[85] the ideologically fractured court[86] held that an accused may expressly waive unlawful command influence as part of a pretrial agreement. In *United States v. Hamilton*[87] the CAAF had held in 1994 that improper conduct in the accusatory stage was effectively waived if not raised at the time. Now, in the blizzard of cases released on the last day of the 1996 term, the CAAF ruled in *United States v. Drayton*[88] that the defense's failure to raise a claim of coerced preferral at trial equated to waiver. In *Drayton*, the defense alleged that the company commander recommended a special court-martial empowered to adjudge a bad-conduct discharge only because of pressure from his superior, the battalion commander. The defense raised the issue for the first time on appeal, and the CAAF majority, in an opinion by Judge Gierke, relied on *Hamilton* to rule that "any defects based on coercion were waived."[89]

With characteristic fervor and occasional hyperbole, Judge Sullivan dissented in *Drayton* but illuminated what may be the path of the court in future cases: considering such pre-referral decisions to lie outside the ambit of conventionally-analyzed command influence, and therefore to be examined independent of Article 37(a). Judge Sullivan criticized the majority for its "embrace of 'Army jurisprudence' and its hyper-technical approach to unlawful command influence in derogation of our own case law."[90] He repeatedly cites *United States v. Blaylock*[91] and *United States v. Hawthorne*[92] for the proposition that com-

81. In paragraph 3, he wrote, "Therefore, request you consider a further investigation of the incident itself, and the larger base 'climate' factors which may have been involved." In paragraph 3c he wrote, "In the interest of a healthier overall Air Force operation at Chicksands, how can those attitudes be modified?" In paragraph 4 he wrote, "I would welcome hearing how you decide to address not only the incident itself, but the overall living and working environment at RAF Chicksands." *Id*. at 312.

82. *Id.* at 314 (Crawford, J., dissenting).

83. 39 M.J. 284 (C.M.A. 1994).

84. *See* R.C.M. 306, 401-07 for options available to commanders, including dismissal, forwarding of charges to a superior or subordinate, and directing a pretrial investigation. In particular, see R.C.M. 306 and its provisions permitting a superior commander to "withhold the authority to dispose of offenses in individual cases, types of cases, or generally," and forbidding a superior from "limit[ing] the discretion of a subordinate commander to act on cases over which authority has not been withheld."

85. 43 M.J. 15 (1995).

86. *Weasler* was a 5-0 decision, but both concurring judges barely agreed with the result while bitterly criticizing the majority's rationale. *Id.*

87. 41 M.J. 32 (C.M.A. 1994).

88. 45 M.J. 180 (1996).

89. *Id*. at 182. The Army Court had found waiver but also moved to the merits of the claim, joining the many cases to rely on *Ayala* for the proposition that the assertion of command influence in this case was "not sufficient to shift the burden of disproving [command influence] to the government beyond the point of equipoise or inconclusiveness." *Id*., *quoting* United States v. Drayton, 39 M.J. 871, 875 (A.C.M.R. 1994).

90. *Id.* at 183 (Sullivan, J., dissenting). Judge Sullivan does not further define "Army jurisprudence," but it is clear that, to him, it is not a favorable concept.

mand influence cannot be waived. He asserts that the majority has determined that pretrial coercion in the preferral of charges "is no longer to be considered unlawful command influence," so that it is not violating the injunction of *Blaylock* that it cannot be waived.[93] He writes that the majority "pays lip service to this Court's decisions in" *Blaylock* and *United States v. Johnston*,[94] but it in fact pays no service to them at all, citing only *Hamilton*, a case in which the defense never asserted the applicability of Article 37.[95] Judge Sullivan's critique of the majority for "this unprecedented narrowing of Article 37(a),"[96] is misplaced as there is hardly a clear line of precedent--not to mention the plain language of Article 37 itself[97]--making clear that Article 37 applies to accusatory-stage command influence.

Finally, Judge Sullivan criticized the CSM who stated at the NCODP that "it didn't look good" for Drayton. He writes that the CSM "should have refrained from asserting his opinion to the NCO's beneath him."[98] He continues: "What damage was done, we'll probably never know. Without the evidentiary hearing that should have been ordered by our court or the court below, we have no chance of ever knowing."[99] This observation is most interesting coming from a judge who joined in the *Gleason* majority opinion. In *Gleason*, Senior Judge Everett assumed a link between the battalion commander's statements and the absence of defense witnesses from the accused's unit; he required no further analysis or inquiry.[100] Here, by contrast, despite five NCO witnesses for the accused (including two senior to him from his own unit), Judge Sullivan laments the absence of a fact-finding hearing to discern the operation of command influence. To live by the *Gleason* reasoning--a superficial link between a superior's statements and the absence of witnesses gives the opportunity to die by that same reasoning--the majority's suggestion here that the CSM's statements cannot have been consequential because witnesses testified anyway.

More Than Academic Interest

Recent high profile cases have generated the opportunity to "make law," in the area of command influence. The sexual harassment cases at Aberdeen Proving Grounds and elsewhere have generated command responses and public comments by military and congressional leaders that are likely to generate litigation and further discussion.

Most command influence litigation stems from the statements or actions of individual commanders, frequently in unremarkable cases. There are, however, the huge command influence cases, most notably those from Third Armored Division in the early 1980s,[101] that stem from "systemic" concerns broached by high-ranking officers. Practitioners will be watching several recent incidents and cases closely for possible resolution on command influence grounds.

Black Hawk, "Accountability," and "Zero Tolerance"

The first major issue concerns the United States Air Force. After the accidental shooting down of an Army Black Hawk helicopter in Northern Iraq in 1994, an exhaustive investigation was conducted. Ultimately, one Air Force officer faced court-

91. 15 M.J. 190 (C.M.A. 1993).

92. 22 C.M.R. 83 (1956).

93. *Drayton*, 45 M.J. at 184 (Sullivan, J., dissenting).

94. 39 M.J. 242 (1994).

95. The *Hamilton* opinion (a unanimous ruling in which Judge Sullivan wrote a separate concurrence that presaged the strain that carries through *Drayton*) expressly intended to preserve the vitality of *Blaylock*, which it cites with approval for the proposition that command influence "at the referral, trial, or review stage is not waived by failure to raise the issue at trial." *Hamilton*, 41 M.J. at 37. It then explains that preferral and forwarding "defects" are not waived--and Article 37 would then apply--*if* the failure to raise them is because "a party is deterred by unlawful command influence." *Id*. In other words, Article 37, standing alone, does not apply to the accusatorial process, but it does apply if command influence keeps a party from raising defects at that stage. The court also noted, importantly for its precedential value and to limit the sweep of Judge Sullivan's criticism in *Drayton*, that Hamilton "does not assert a violation of Article 37 in the case before us." *Id*.

96. *Drayton*, 45 M.J. at 183 (Sullivan, J., dissenting).

97. Article 37 provides in pertinent part: "No authority convening a . . . court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . in reaching the findings or sentence in any case." The plain language of the statute points to the adjudicative process.

98. *Drayton*, 45 M.J. at 184 (Sullivan, J., dissenting). This unremarkable criticism tracks with the majority's similar characterization of the CSM's remarks. *See supra* note 33 and accompanying text.

99. *Id.*

100. *See generally* United States v. Gleason, 43 M.J. 69, 74-76 (1995).

101. *See, e.g.*, United States v. Treakle, 18 M.J. 646 (A.C.M.R. 1984) (division commander's remarks calling for "consistency" in court-martial recommendations were interpreted to impinge on recommendations for disposition and discourage witnesses from testifying).

martial and was acquitted. Numerous other individuals received various administrative sanctions. Many of the sanctioned individuals later received promotions, favorable ratings, and awards. This concerned Major General Ronald Fogleman, Chief of Staff of the Air Force, who then taped a message that was distributed worldwide for viewing by all Air Force officers. In the tape he spoke of the need for "accountability" by individuals for their actions.[102] He was frustrated by what he saw as the inconsistency that many of the actors involved in the shootdown continued their careers unscathed. He called for standards to be "consistently applied, nonselectively enforced . . . holding ourselves and each other accountable."[103] Actions such as an officer receiving a letter of reprimand followed by a "firewall OER or a choice job," he said, "leads me to question the lack of accountability following the breaking of our standards."[104] Nowhere in the tape did General Fogleman recommend or direct a particular disposition of any case, and in fact he went to great lengths to emphasize his faith in the military justice system. Still, it left the clear implication that *something* must be done, contributing to the argument that his speech affected potential actions or levels of disposition in future cases. On the other hand, of course, is the argument that the Chief of Staff of an armed force is entitled to express his dissatisfaction with good order and discipline, and to speak of the need for accountability--greater attention to justice in addressing misconduct--and that to remove or significantly limit his authority to do so is to remove one of the fundamental aspects of command which is the authority and responsibility to lead troops and set and enforce the appropriate level of discipline.

Congress also had concerns about the Black Hawk shootdown, issuing subpoenas to several officials involved in the decision not to prosecute two Air Force officers for their roles in the shootdown. Subpoenaed were the general court-martial convening authority, his staff judge advocate, a major general who chose not to charge the pilots, and the Article 32 investigating officer.[105] The subpoenas triggered a strong response from the Department of Defense. Undersecretary John White responded that such an inquiry "risks fostering the perception that officials discharging their duties under the [UCMJ] must now be concerned with whether their deliberations and decisions will be subjected to congressional scrutiny, possible congressional criticism or public censure."[106] None of which is to say that Congress's role in investigating the exercise of military justice is per se inappropriate. The specter of command influence arises in this situation, not so much because of congressional pressure, because there is no *command* aspect to oversight of the Uniform Code by the body that wrote the Code. It does, however, give rise to the colorable argument that commanders, conscious of the possibility of congressional scrutiny, will tailor their dispositions of cases in such a manner as to evade uncomfortable scrutiny. The argument would be that a commander in a high profile case (*e.g.*, the Black Hawk shootings, sexual harassment prosecutions, or other highly publicized incidents) will be more likely to initiate or recommend a harsher disposition to avoid the criticism of those who would characterize the actions as soft on crime or indifferent to victims. So long as the military justice system is a commander-run system, any factors that would tend to affect the independence of these commanders--which in turn could affect the disposition of cases--merits special scrutiny. Some officials, according to the *Washington Post*, suggested that Congress may inquire into military justice just as it does on occasion when it calls United States attorneys to testify about criminal cases.[107] The analogy is imperfect, however, because United States attorneys do not hold equivalent positions to commanders and, *inter alia*, they are not required to rely on grand juries to issue indictments in cases they want to prosecute.

Versions of this criticism appeared in the wake of the sexual harassment prosecutions in the Army, following a highly publicized aircraft accident at Spangdahlem Air Force Base, Germany, and after the crash of the aircraft carrying Commerce Secretary Ronald H. Brown to Croatia in 1996.[108] Sixteen officers received varying levels of punishment after the crash, according to Air Force officials. Some sources attributed the sanctions against those officers directly to the climate of height-

102. General Ronald R. Fogleman, Air Force Chief of Staff, *Air Force Standards and Accountability* videotape (1995) [hereinafter Fogleman tape] (on file with author).

103. *Id.*

104. *Id.* ("firewall OER" is an Air Force term for superior or "waterwalker" officer evaluation report).

105. Bradley Graham, *Panel Summons Air Force Prosecutors in Helicopter Downing*, WASH. POST, Nov. 2, 1996, at A10.

106. *Id.*

107. *Id.*

108. For a critical but detailed treatment, *see* Steven Watkins, *The High Cost of Accountability*, AIR FORCE TIMES, Dec. 23, 1996. The issue also has arisen in the controversy over the investigation and efforts to assess responsibility for possible dereliction in failing to take action before the bombing of the 1996 Khobar Towers housing complex in Saudi Arabia, which housed American airmen. Several news accounts have suggested that the pressure for more definitive action has stemmed from General Fogleman's tape and the heightened culture of "accountability." *See, e.g.*, Bradley Graham, *Air Force Report Already Rebuts Saudi Bombing Critics*, THE WASH. POST, Mar. 15, 1997, at A9 (discussing "continued demands in Congress and elsewhere for accountability in the deaths" and injuries, and claim that "Pentagon civilian leadership has pressed the Air Force into extending the inquiry and focusing on whether any nonjudicial administrative action may be warranted"). Defenders of General Fogleman would argue that these congressional demands vindicate the propriety of the statements, and that only the starting point for discussions was altered without dictating particular dispositions in particular cases.

ened attention fostered by General Fogleman's accountability videotape.[109]

The highly-publicized charges of sexual misconduct against a number of Army drill sergeants at Aberdeen Proving Ground and elsewhere have raised similar questions, because the Army leadership, including the Chief of Staff and Secretary of the Army, have made several public statements pledging to address the problem, and stating the Army's "zero tolerance" for such conduct. The defense already has filed several motions, unresolved at this writing, relating to potential command influence in the cases, but the defense still faces the considerable challenge of linking statements by high-ranking officers with provable effects, under the *Ayala-Stombaugh* rubric, on the parties (witnesses, intermediate commanders, panel members) that the law regarding command influence is designed to protect.

Events such as the General Fogleman tape, congressional hearings, or highly public cases are not likely to trigger the more traditional command influence charges. It is exceedingly difficult to show that actors at that level, indirect and diffuse as they are, have a direct and measurable effect on a particular case. Defense counsel are more likely to argue that the level of disposition was altered or "ratcheted up" because of the perceived pressure and in anticipation of having to account for one's actions in another forum. Even this line of argument is not unique,[110] but it has not been lodged in such a systematic fashion since the command influence cases in the Third Armored Division, and even there, the language came from the division commander who actually convened the courts.

The Higher They Go . . . The Lighter They Fall?

Related to this area of inquiry is the question of whether command influence, paradoxically, becomes more attenuated at the very highest level of command. Although in rare instances even the Secretary of the Army can convene courts-martial,[111] virtually all courts are convened by the two and three star officers who hold traditional command billets at divisions, corps, and equivalent levels. While the defense no doubt will argue that having the Chief of Staff or the Secretary of the Army proclaiming "zero tolerance" may chill potential witnesses,[112] the Government can counter that these individuals are least likely to intimidate witnesses, deprive commanders of discretion, or "crawl into the deliberation room" and affect deliberations. The essence of the prohibition against command influence is to free the primary actors in courts-martial from command pressure. A persuasive case can be made that those at the very highest levels are less likely to wield such an intimidating impact and that more immediate superiors--at the battalion, brigade and division levels--who are immediately visible to soldiers, and to whom subordinates feel accountable (and who depend on the superiors for ratings, assignments, and reputations), carry greater potential impact, and that it is their actions that warrant the greatest scrutiny. For example, in the Aberdeen cases, a memorandum from the commander of the Ordnance School, home of the accused soldiers, contained potentially objectionable language.[113] The author of the memo, however, was not the general court-martial convening authority and therefore not involved in panel selection. Obviously other issues arise from such a memo, including the issue raised in *Newbold*--whether improper or inflammatory statements by a high-ranking non-convening authority can still amount to command influence. Unanswered is the extent to which such statements can contribute to an atmosphere in which it may become difficult to recruit witnesses, but the fact that the author is not the ultimate convening authority improves the government's posture, although his proximity to the soldiers and witnesses helps the defense.

Conclusion

It is very unlikely that the CAAF is going to issue *the* comprehensive command influence ruling at any time. This is largely because of the diversity and complexity of the command influence area, as the term is only defined by the context of the particular case. Practitioners, therefore, need to be less alert to landmark decisions and more closely attuned to each

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109. Rowan Scarborough, *Air Force Penalties in Brown Crash Hew to General's Line,* WASH. TIMES, Aug. 8, 1996, at A4. General Fogleman's edict, distributed worldwide and mandatory viewing for all officers, explains why the Air Force reached deep down the chain of command to punish officers in the April crash.

110. *See, e.g.*, United States v. Martinez, 42 M.J. 327, 331 (1995) (defense asserted that negligent homicide charge against the accused "would not have gone to court if it occurred at any other time or any other base").

111. *See* UCMJ, art. 24(a)(2) (1988). Also relevant to the discussion, of course, is the Secretary's authority to approve dismissals and to take other post-trial action. *See id.* art. 71(b).

112. A separate issue, of course, is whether such language, standing alone, connotes command influence. A strong argument can be made that zero tolerance merely suggests that action of the same sort will be taken upon confirmation of objectionable conduct. Still, language that suggests inflexibility invariably generates strict scrutiny by the military appellate courts. *See, e.g.*, United States v. Griffin, 41 M.J. 607 (Army Ct. Crim. App. 1994).

113. Memorandum, Commander, United States Army Ordnance Center and School, Aberdeen Proving Ground, Maryland, subject: Level I Video on Prevention of Sexual Harassment (1 Oct. 1996). The memo includes the following paragraph:

> Possibly the worst event in the life of a soldier, short of death, is sexual abuse. Our Army has always taken care of its own better than any other organization I can think of; that will be the case here . . . . All of our soldiers must understand that sexual abuse and sexual harassment are intolerable acts no human should have to endure; ones that will not be overlooked or forgiven. You and I will not allow even the slightest trace of such behavior to linger.

command influence case, each of which can give a creeping indication of the direction in which the courts are moving. Clearly the courts are moving toward severing pre-referral command influence from the ambit of Article 37. Whether they characterize the failure to raise these issues as waiver or simply remove them from Article 37 (preserving the veneer from *Blaylock*, *et al*. that command influence cannot be waived at any stage), they will analyze these cases on a more indulgent plane. Less clearly but increasingly apparent, there seems to be a trend to analyze the speech of individuals senior to the accused (as was the case with the boat commander in *Newbold* or the CSM in *Drayton*) strictly in terms of its provable effect on a case, and a decreased willingness to provide a windfall to the accused merely because of the intemperate statements of someone in the chain of command.